82-2147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No.

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 17,

Petitioner,

v.

DENNIS M. YOUNG AND MICHAEL MORAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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On the Petition.

QUESTION PRESENTED FOR REVIEW

Does the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401, *et seq.*, require and may a court dictate that a trial body be composed only of the peers of the accused or, is the Act satisfied if the composition of the trial body complies with the union constitution and the accused has been served with written specific charges, given a reasonable time to prepare a defense and afforded a full and fair hearing as required by the Act?

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Petitioner, INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 17 ("Petitioner" or "Union"), respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit was issued as an unpublished order per Circuit Rule 35 and appears on pages 1-9 of the Appendix

at the back of this Petition. Its unpublished order denying a motion for rehearing and suggestion for rehearing *in banc* appears at page 10. The unpublished final judgment order and memorandum opinion by the United States District Court for the Northern District of Illinois, Eastern Division, appears on pages 11-16 of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 15, 1983. A petition for rehearing, with suggestion for rehearing *in banc* was denied on March 29, 1983. The mandate was stayed through June 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

STATUTES INVOLVED

Section 101(a)(5) and (b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(5) and (b), 73 Stat. 522, ("Act" or "LMRDA") are the statutes involved. Section 101(a)(5) of the Act provides that: "*Safeguard against improper disciplinary action.* No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." LMRDA Section 101(b) provides that "Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect."

STATEMENT OF THE CASE

This matter was originally brought before the district court pursuant to Section 102 of the Act, 29 U.S.C. § 412. Respondents (Plaintiffs), "apprentice members" in the Union, brought an action alleging that they were wrongfully expelled from a jointly (labor and management) administered, United States Department of Labor ("DOL") certified and supervised apprenticeship program[1] and from the Union in violation of Section 101 (a)(5) of the Act, 29 U.S.C. § 411(a)(5).[2] These two men and 58 other were expelled because of poor attendance on actual jobs, *i.e.*, they did not meet the 400 hours per quarter work requirements, when work was available.[3] Prior to Re-

1. 29 U.S.C. § 50 provides that the "Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, (and) to bring together employers and labor for the formulation of programs of apprenticeship . . .". Exercising his statutory authority, the Secretary of Labor has issued regulations which govern certified apprenticeship programs, 29 C.F.R. Part 29.

2. As noted above, Section 101(a)(5) of the Act, 29 U.S.C. § 411 (a)(5), provides that "(5) *Safeguards Against Improper Disciplinary Action.* No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

3. The program was having a problem getting the apprentices to work the required hours. The apprentices were mainly in their late teens and early twenties and were high school graduates or possessed GEDs, although those without a diploma were accepted if they agreed to obtain their GED during the first year of the program. In these latter cases, the JAC assisted the apprentice in fulfilling the GED requirements.

spondents' expulsion, they were called before the Joint Apprenticeship Committee ("JAC") and given the opportunity to explain any extenuating circumstances. There being none, they were put on three months' probation and told simply to work (the standard) 400 hours in the next quarter. When they did not do so, they were again called before the JAC and given a full and fair hearing which resulted in their termination. They then exercised their right to appeal any contested facts, as well as the JAC's decision, to the Joint Trade Board ("JTB") which voted to affirm the JAC's decision. If the JTB had deadlocked on the JAC's decision, the matter would have been referred to an arbitrator selected under the auspices of the American Arbitration Association. The men also contested their termination by filing three separate charges with the National Labor Relations Board which dismissed the charges, all dismissals being affirmed on appeal. Respondents also filed a complaint with the Department of Labor which affirmed the validity of their dismissal from the JAC.

The JAC which, as noted, is comprised of an equal number of Union and management representatives—as is the JTB—is a contractual creation of the Union's collective bargaining agreement with the Illinois Regional Insulation Contractors Association. Once created, however, the JAC sought and received certification from DOL which means that DOL regulates all facets of the program. Persons participating in the apprentice program are federally indentured and, for continued participation therein—and for the programs own continued certification—are required to comply with all the standards, rules and regulations. Individuals who apply for apprenticeship are reviewed and selected by the JAC. Once an individual is selected by the JAC, he or she signs a federal apprenticeship (indenture)

agreement which is co-signed by the JAC and the DOL. The apprentice is then placed under the sole control of the JAC, its program and all matters related thereto, including, but not limited to, periodic review of the apprentice, the setting of apprenticeship standards, the education and training of the apprentice, the procurement of and assignment of work for the apprentice and the evaluation of the apprentice with respect to continued participation. Another facet of the JAC's program of insulation industry education is that its apprentices are automatically given limited membership in the Union so that they may be introduced to the workings of the democratic organization which will play an important role in their adult lives. DOL embraces this derivative and limited Union membership which permits the JAC's apprentice to attend and speak at union meetings without having the right to vote or run for union office.[4] Solely upon satisfactory completion of the JAC's four-year apprentice program, apprentices automatically become journeymen workers and full fledged members of the Union.[5]

As in any school, not all individuals satisfactorily progress or graduate. Therefore, DOL has taken special precautions to assist and protect its matriculating indentured apprentices. In this area of discipline, DOL has mandated—and the JAC standards provide—that termination

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4. 29 C.F.R. Part 452.89.

5. The JAC, the contractors association, its members and the Union are operating under a Title VII Civil Rights consent decree which basically provides that membership in the Union can only be obtained upon graduation from the JAC program. (United States District Court for the Northern District of Illinois, Case No. 73 C 2020). Since the JAC determines who will become an apprentice, it is the JAC which, in fact, controls the admission of all new members into the Union.

be only for just cause, after notice, a full hearing, a reasonable opportunity for corrective action (*e.g.*, probation) and written notification of the final disposition taken.[6] Expresing this same spirit of interest and concern, the JAC has exceeded the requirements of DOL and has provided for appellate review of its decision. And, super-imposed on this entire structure, of course, is the apprentice's right to appeal a joint apprenticeship committee's decision to DOL, itself. These requirements, and the additional protections identified far exceed the LMRDA's requirements of written notice, reasonable time to prepare a defense and a full and fair hearing.

Taking special cognizance of the uniqueness of DOL's certified apprentice programs and its indentured apprentices, the Petitioner's International Union has recognized the importance of including membership in the Union as part of the apprentice program. For such reason, the International Union has created, as suggested by DOL, the limited (the apprentice can only attend and speak at meetings) and derivative Union membership for the federal apprentice. In situations where an apprentice is terminated from a DOL regulated apprentice program because of an infraction of his federal indenture agreement, the International Union's Constitution provides that "Where a local union has an approved indentured (*i.e.*, federal certified) Apprenticeship Program, cancellation of an apprentice agreement, for a just cause, after notice and hearing by the Joint Apprenticeship Committee, shall automatically cancel . . . membership in the International . . . and the local union." Thus, the JAC which has the sole right to grant apprentice membership and journeymen

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6. **29 C.F.R. Part 29.6(h)(2).**

membership in the Union has the sole right to terminate an apprentice's Union membership, for a violation of the federal indentureship agreement. If an apprentice violates the Union's bylaws with respect to internal Union infractions, then the individual is tried under the same provision of the International's Constitution as a journeyman member is tried, *i.e.*, before the Executive Board of the Union.[7]

The Precipitating Incident

Petitioner automatically cancelled Respondents' limited and derivative membership in the Union *only* after they had their federal indentureship agreement cancelled for just cause, after notice and hearing—and after their ex-

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7. The Plaintiffs did not submit a brief to the Seventh Circuit and failed to respond to two Rules to Show Cause as to why the appeal should not be submitted without the Plaintiffs arguing orally [Circuit Rule 8(c) derivative of Federal Rules of Appellate Procedure Rule 31(c)]. The Circuit issued its memorandum without oral argument and without complying with its own Rule 14(f) which requires that if it decides to consider an appeal without oral argument, it will give the party an opportunity to file a statement why oral argument should be granted [Circuit Rule 14(b) premised upon FRAP Rule 34(a)]. Some portions of the Circuit's decision then became an *ex parte* edict because the Order treated matters not briefed by Petitioner and obviously then, not addessed by Petitioner since there was no reply brief or oral argument. One such matter was the finding by the Circuit that Article XXIV of the International Constitution listed 13 offenses of a union internal nature for which a member might be penalized and that an apprentice would be tried for a claimed violation of such offenses by the JAC. (Slip op. pg. 5; App. 7). This is totally factually erroneous for it is only when an apprentice is expelled by the JAC from the apprenticeship program for reasons related to that program that the apprentice member of the Union automatically loses his apprenticeship membership in the Union.

haustion of DOL's and the JAC's procedural protections which far exceeded those afforded by Section 101(a)(5) of the Act, 29 U.S.C. § 411(a)(5)—a "just cause" determination which was subsequently reviewed and adopted by both the DOL and NLRB and, as demonstrated below, by both the district and appellate courts.

The Decisions of the Courts Below

The district court's memorandum opinion found that "to the extent plaintiffs seek reinstatement into the apprenticeship program, we agree with the defendant that we are unable to grant the relief requested. The JAC is the body responsible for the plaintiffs' termination, and would be the body responsible for their reinstatement. However, the JAC is not a labor organization, and is therefore not amenable to suit under the LMRDA. Since the JAC is not, and could not be before this court, we disregard plaintiffs' request for reinstatement into the apprenticeship program. *Moreover, it appears to us that even if the JAC were subject to suit under the LMRDA, the procedure the JAC followed in terminating plaintiffs' apprenticeship would satisfy the requirements of § 411(a)(5)*". (Slip op. pg. 4; App. 14). (Italics supplied).

Despite their finding that the JAC satisfied the LMRDA's requirements [§ 411(a)(5)] in the expulsion of Respondents, *i.e.*, that they were served with written specific charges, given a reasonable time to prepare a defense and afforded a full and fair hearing, the lower courts held that there nevertheless was a *per se* violation of § 411 (a)(5) because the trial body, the integrity of which was not even questioned, was not composed of Plaintiffs'

"peers"—members of the Union.[8] The lower courts legislated this special requirement. They voided that portion of the International Constitution which provided for automatic cancellation of apprentice membership in the Union upon termination from the apprenticeship program and created the anomalous situation where the individual was still an apprentice member in the Union but could no longer legally be employed in the industry because he was neither an apprentice nor a journeyman and could not obtain journeyman status having been terminated from the apprenticeship program. Moreover, even if the International Constitution were amended to provide that the individual would be tried before the Executive Board of the Union (as is the case with claimed union infractions relative to both apprentices and journeymen) the possibility of an inconsistent

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8. As the trial judge stated on September 1, 1978, "I do not regard a committee of 50 percent management and 50 percent union as the type of committee that is contemplated by this statute as being a body that should determine union discipline. . . . (Petitioner's Counsel) . . . where in there [Section 101(a)(5)] does it determine what the trial body should be? COURT: Well, it is by implication. I do not think you could try them before the League of Voters on the . . . Petitioner's counsel: You could, you could if they gave them a full and fair hearing. THE COURT: I do not think so. I think you have to give the statute a reasonable construction and it seems to me that a reasonable construction means a trial body that is within the Union—if you want to have outsiders in it—maybe you could set up a situation where you would call in an arbitrator. (Indeed, that is the final step in the Petitioner's contractual grievance framework if no resolution is reached at any of the earlier steps of the procedure). Petitioner's counsel: You have no right to redo our (International's) constitution, your Honor. THE COURT, Well, I am not redoing your constitution. What I am doing is interpreting the statute." The trial court concluded stating that the only issue in this case is: "My ruling . . . that the Joint Appenticeship Committee is not a body that satisfies the requirements of Title XXIX, Section 411(a)(5)."

result would be present with the same potential anomalous situation—no apprenticeship status but apprentice Union membership. And, of course, this is without even being reminded of the fact that the apprentice Union membership was itself *totally* derivative from the apprenticeship status conferred by the same body which terminated it.[9]

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The decision of the Seventh Circuit Court of Appeals conflicts with the decisions of other federal courts of appeals on the same matter and the Seventh Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. The Seventh Circuit's decision found that the JAC extended a full and fair hearing to Plaintiffs within the meaning of the LMRDA. Having made such a determination, the matter should have ended there. It did not. Ignoring their own full and fair hearing finding, the lower court became involved with the composition of the trial body—a composition literally mandated by the Department of Labor which regulated it and which was approved by the Justice Department and another federal court in a civil rights consent decree.

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9. The district court awarded attorneys' fees to Respondents' attorneys. In order to avoid an evidentiary hearing on the scope of the work and the reasonableness of the fees, an agreed order was entered making the "payment of attorneys' fees contingent upon and only to be paid in the event of and after the final appellate affirmance of this Court's . . . decision reinstating Plaintiffs as members of the defendant Union." Also, only after a bifurcated plenary trial on the question of damages for expulsion from the Union (App. 8-9), did the district court find no damages for the two Plaintiffs involved in this case. The Court of Appeals apparently thought this was an automatic finding (App. 8) overlooking the fact of the plenary trial.

Being an apprentice under the federally supervised apprenticeship program and an apprentice member of the Union are intricately connected. Membership in the Union is derived from indenture in the apprenticeship program. An apprentice member in the Union has no reason to exist without the individual being in the apprenticenhip program. The Department of Labor regulations relative to the Joint Apprenticeship Program require joint employer-employee committees and the policy is to create early exposure of the young apprentices to the responsibility and activities of unions and their members. Joint administration means 50% employer representation and 50% employee representation. These representatives through an approved testing procedure pick the cream of the crop. Neither the Union nor the Employer's Association, as such, or any individual employer has any personal power. The Joint Apprenticeship Committee makes the selection as to whom shall become an apprentice and the Union is required to automatically grant apprentice membership to such selectee. The JAC also assigns apprentices to employers for purposes of employment and the employer automatically hires the apprentice. The apprentice can only be discharged from employment by the JAC. Thus, the Joint Apprenticeship Committee fully administers the program—curriculum, education, on the job training, evaluation, minimal requirements for continued participation, etc. These are all embodied in standards and the standards must not only conform to the Code of Federal Regulations but also to the constant supervision of the Department of Labor officials of the Bureau of Apprenticeship and Training. Here the JAC, in its considered judgment, expelled non-conforming apprentices from the program after a hearing, after placing the apprentices on probation and even after a subse-

quent hearing following the violation of probation. The Joint Apprenticeship Program was a creation of the collective bargaining agreement and the agreement itself provided for appeals in the event the apprentices questioned the findings. What a democratic and wise design. Yet, despite all of the attendant review, unthinkingly the Seventh Circuit would apparently have these apprentices tried *de novo* before a body consisting solely of Union members. Would this extend to the charged apprentices any greater due process? Would this give them more of a full and fair hearing? All it would do would be to destroy the overall federally approved design and generate confusion which could end up destroying the apprenticeship program. If a joint committee could not exercise legitimate control over such a program and if separate independent status could be created for an individual (apprentice) selected by such committee, then both the concept of genuine collective bargaining and the intent of the federal apprenticeship statute (29 U.S.C. § 50) "To bring together employers and labor for the formulation of programs of apprenticeship" would be frustrated.

The district court seems concerned that the trial body was not composed totally of the apprentices' "peers" and the Court of Appeals seems concerned with the fact that employer representatives were members of the JAC whose findings determined whether or not the apprentice lost his apprentice membership in the Union. One's first impression might be that the lower courts were just too mechanical and literal. In actuality, they were not for there is nothing in the Act, in the legislative history, in any regulation or in any decision other than these two lower court decisions requiring trial by one's peers or excluding employer representative participation in circum-

stances of the type involved here. In reality, apprentice membership in the Union is merely another class in the JAC's apprenticeship curriculum. It exposes the apprentice to Union membership meetings and to other Union members who work at the trade. The International Union accepted this as part of the apprenticeship curriculum and granted such apprentices the right to attend Union meetings by designating them as apprentice members, for it is only members who are permitted to sit in Union meetings. It is nonsense to say that an otherwise full and fair hearing was vitiated here when it was the same employer representatives, who sat on a joint committee with Union representatives—all sitting as members of the JAC owing a legal duty to the DOL, who selected the apprentice for indenture, automatically provided for the derivative Union membership, monitored each facet of the apprentice's progress through the program, reported same to the DOL and then, and only then, by virtue of all of these factors, participated in the decision to terminate the apprentice from the JAC and its derivative Union membership. And, the lower court's decisions become even more incomprehensible when one remembers that DOL's regulations are more stringent than the LMRDA.

But there is more. The Seventh Circuit, actually, legislatively imposed new requirements on the LMRDA contrary to the express words and legislative history of said Act. And, the decision conflicts with decisions of three other Circuits.

As finally enacted by Congress, the Act was designed to have unions regulate themselves. It sets forth broad parameters (*e.g.*, the right to make reasonable rules) and in the area of discipline and expulsion, certain "safeguards," as the legislative history reflects. For example, on April

22, 1959, Senator McClellan proposed a bill of rights for union members which included ". . . a full and fair hearing . . . accorded final review . . . by an impartial person or persons (i) agreed to by such organization and the accused, or (ii) designated by an independent arbitration or mediation association or board."[10] Three days later, on April 25, 1959, the Senate eliminated these requirements for in Senator Kuchel's words, it was ". . . cumbersome and unnecessary . . . (because) the U.S. district court will be able to determine whether the rights of the union member have been protected and whether he had . . . a reasonable hearing. . . ."[11] The requirement of a tribunal composed of non-members of the union would obviously have been more restrictive, but the Act's failure to so provide did not foreclose the possibility of its use or the use of any modification thereof. The point is that Congress had decided, as Senator Kuchel stated, not to impose its view of what constitutions should provide, but rather, when requested, to have courts inquire into the "reasonable(ness) (of the) hearing;" and, in the words of the Act, to inquire into whether the member had been "afforded a full and fair hearing."[12]

As noted, the Seventh Circuit's intrusion into the composition of trial bodies is unique. Three other Circuits have retained their roles as courts and have applied the Act as Congress wrote it. The Circuit Court for the District of Colunbia was confronted in *Ritz* v. *O'Donnell*, 566 F. 2d

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10. Senate Bill 1555, 86th Cong., 1st Sess. (105 Cong. Rec. 5810, April 22, 1959).

11. Senate Bill 1555, 86th Cong., 1st Sess. (105 Cong. Rec. 6023, April 25, 1959).

12. Senate Bill 1555, 86th Cong., 1st Sess. (105 Cong. Rec. 5819, April 22, 1959).

731 (C.A. D.C., 1977), with a trial body whose composition was allegedly *per se* invalid because, contrary to the union's own rules, it included members who were employed by the same company as two of the charging parties. The District of Columbia Circuit stated that "Plaintiff has made no attempt to show any actual prejudice from the composition of the Appeals Board, so we must construe the argument as one of inherent prejudice (footnote omitted). The statutory test for this claim is whether plaintiff got a 'full and fair hearing' . . ." 566 F. 2d 731, 737 (C.A. D.C., 1977). Thus, in *Ritz*, the Circuit Court for the District of Columbia, affirming a district court, held that the test of whether an individual has been wrongfully disciplined by an "inherently prejudiced" trial committee under the Act is whether there was a full and fair hearing. The Seventh Circuit takes the contrary position and holds that although the expressed statutory elements of a "full and fair" hearing have been complied with, there can be no full and fair hearing unless the trial body contains a particular composition. By definition, absent such composition, it becomes inherently prejudiced and *per se* illegal.

Similarly, the Seventh Circuit's decision is contrary to the Fourth Circuit's position on the Act. In *Parks* v. *International Brotherhood of Electrical Workers*, 314 F. 2d 886, 912-913 (C.A. 4, 1963), *cert. den.*, 372 U.S. 976 (1963), the Fourth Circuit held that only upon a showing of specific prejudice as opposed to built-in bias can a federal court find a tribunal biased.[13] And, finally the Seventh Cir-

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13. More specifically, in *Parks* v. *International Brotherhood of Electrical Workers*, 314 F. 2d 886, 913 (C.A. 4, 1963), *reversing and remanding*, 203 F. Supp. 288 (D.C. Md., 1962), *cert. den.*, 372 U.S. 976 (1963), the Fourth Circuit was presented with the same issue

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cuit decision conflicts with the Third Circuit's position in *Martire* v. *Laborers' Local Union 1058*, 410 F. 2d 32 (C.A. 3, 1969), *cert. den.*, 396 U.S. 903 (1969). In *Martire*, a local union member was tried by a district council (another body within the internation union composed of members and non-members of the local union). Martire challenged the trial by the district council contending that he should be tried by the members of his own local union. "Martire (just as the instant plaintiffs) (did) not contend that he was denied a fair hearing . . . that the evidence presented before the . . . Trial Board did not support its action and . . . the District Court made the fact finding that '(t)he grounds for the disciplinary action . . . (were) supported by substantial evidence.' " 410 F. 2d 32, 37 (C.A. 3, 1969). The Third Circuit held that ". . . we can find no basis, either in the Act itself, or in the legislative history for concluding

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before this Court, but in reverse. The Court in *Parks* stated, "it may well be thought desirable, for unions to adopt hearing procedures that keep trial functions separate (from other union functions and functionaries), but the federal courts are not empowered so to restructure the disciplinary procedures of unions. Cf., Summers, 'Legal Limitation on Union Discipline,' 64 Harv. L. Rev. 1049, 1083 (1951) (implied). Some unions, like the United Automobile Workers, have responded to the pressure for fairness in internal trial proceedings by establishing, essentially external to the union organization, independent public review boards having the final word in disciplinary matters. Such unions would appear to have gone far to separate prosecuting and ultimate judicial functions. But, in the absence of a clear congressional authorization, it is not for the federal courts to compel such measures. This is, in effect, what the District Court's decision has done. . . . Courts, federal courts, especially, are justified in ruling a union tribunal (improperly composed) based only upon a demonstration that it has been substantially actuated by improper motives—in other words, only upon a showing of specific prejudice. This element has been found absent from the present case."

that Congress intended to include this right (to a trial before the members of one's own local union) in the requirement for a 'full and fair hearing.'" 410 F. 2d 32, 37 (C.A. 3, 1969).

Thus, the Third, Fourth and District of Columbia Circuits when presented with an (allegedly) inherently prejudiced trial committee looked not to the composition of the committee but to whether or not that body gave the accused a "full and fair hearing." The Seventh Circuit, on the other hand, irrespective of the fullness and fairness of the hearing, *dictated* the composition of the trial committee and the court's contrariness is further highlighted by its refusal to note the special nature of the derivative apprentice membership in the Union and the fact that the same body selected the individuals to be apprentices and, accordingly, apprentice Union members.

Apart from the fact that the Seventh Circuit's decision is directly in conflict with other circuits, the labeling of the decision by the Circuit as a narrow one is not only misleading, but simply wrong. As the Fourth Circuit's decision in *Parks* stated, (See *supra* fn. 13, pgs. 15-16), some unions, such as the United Auto Workers and others such as the Upholsterers International Union, Western Association of Pulp and Paper Workers and the American Federation of Teachers, have adopted Public Boards to consider and rule upon disciplinary action taken against union members. The United States Department of Labor has recognized the legitimacy of these committees,[14] but under the instant de-

14. See, Department of Labor's *Disciplinary Powers and Procedures in Union Constitutions* (Bulletin No. 1350) (at pg. 114). Jerome H. Brooks, "Impartial Public Review of Internal Union Disputes: Experiment in Democratic Self-Discipline," 22 *Ohio State L.J.* 64 (1961), and cases cited therein.

cision of the Seventh Circuit these bodies would be impermissible *per se*. Similarly, other international unions, such as the United Association of Plumbers whose constitution contains an identical provision to that contained in the instant case is in jeopardy. Unions, whose combined membership runs into the millions, may be affected. Indeed, the decision of the Seventh Circuit is not a narrow one.

Given the special status of the federally indentured apprentice and the scope of the Seventh Circuit's decision, it is abundantly clear that this is an important question which has not been, but should be settled by the Court.[15] The entire concept and framework created by DOL, joint committees and by unions, themselves, to bring together all parties for the purposes of increasing harmony and productivity in labor relations may be at stake.

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15. Moreover, the Seventh Circuit may have acted in such a way as to conflict with this Court's decisions in *General Drivers* v. *Riss*, 372 U.S. 517 (1962) and *Humphrey* v. *Moore*, 375 U.S. 335 (1964), which have recognized the sanctity of joint labor-management committees.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this petition for writ of certiorari be granted.

Respectfully submitted,

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Chicago, Illinois
June 20, 1983

APPENDIX

No. 81-2375

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

(Submitted February 4, 1983)*

February 15, 1983

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge

DENNIS M. YOUNG and MICHAEL MORAN,

Plaintiffs-Appellees,

vs.

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 17,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 78 C 1897 JOHN F. GRADY, *Judge.*

ORDER

This is an appeal from the district court's holding that the appellees were unlawfully expelled from their union in violation of Section 101(a)(5) of the Labor-Management

* On March 25, 1982 this court issued an order noting the appellees' failure to file a brief and ordering the appellees to respond

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Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(5). The jurisdiction of this court is based upon 28 U.S.C § 1291. We affirm.

I.

The plaintiffs-appellees were apprentices in the Asbestos Workers Apprentice Training Program, a program jointly administered by labor and management which is certified and supervised by the Department of Labor pursuant to 29 U.S.C. § 50. The apprentice program that the appellees joined is administered by a Joint Apprenticeship Committee (JAC) which is composed of an equal number of union and industry members. As members of a JAC administered program the appellees automatically received limited (apprenticeship) memberships in the union.

On November 23, 1977 the appellees were placed on probation by the JAC for failure to meet the program's requirement of 400 hours worked per quarter. On March 16 and 17, 1978 the appellees were notified to appear before the JAC. The appellees attended the March 22 meeting where it was indicated they had not completed the required hours. The JAC reconvened on March 24 and voted to

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(Footnote continued from preceding page)

within fourteen days as to why this appeal should not be submitted for decision without the filing of a brief or oral argument by the appellees, pursuant to Circuit Rule 8(c). The court received correspondence from the attorney who represented plaintiffs-appellees in the district court indicating that he had not been retained for the appeal. The attorney stated he had informed the appellees of the appeal that was certain to follow the decision of the district court and of their right to cross-appeal on certain matters. The court has not received any further communication from the appellees or any legal counsel they may have retained. Accordingly, this case has been submitted for decision on the existing record.

remove the appellees from the program.[1] The appellees appealed to the Joint Trade Board, a body composed of five employer representatives and five union representatives. After a hearing, which included the testimony of witnesses, the Joint Trade Board voted to affirm the decision of the JAC. Following the vote of the Joint Trade Board the appellees were removed from the apprentice program, which under the Constitution of the Union automatically cancelled their membership in the union.[2]

II.

On May 15, 1978, following their expulsion from the apprentice program and the union, the appellees brought suit alleging that the union had violated 29 U.S.C. § 411(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) which states:

> Safeguards against improper disciplinary action—No member of any labor organization may be fired, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any

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1. All 4 contractors voted to remove the appellees from the program and the union representatives split 2 to 2.

2. Article 3(7) of the Constitution of the International Association of Heat and Frost Insulators and Asbestos Workers provides:

> Where a local union has an approved indentured Apprenticeship Program, cancellation of an apprentice's agreement, for just cause, after notice and hearing by the Joint Appenticeship Committee, shall automatically cancel his membership in the International Association of Heat and Frost Insulators and Asbestos Workers and the local union.
>
> There will be no appeal to the International Association of Heat and Frost Insulators and Asbestos Workers by an Apprentice on cancellation of his membership.

> officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. § 411(a)(5) (1976).[3]

Judge Grady held that the termination of Moran and Young violated the "full and fair hearing" provision of Section 411(a)(5)(C). Although he conceded that the appellees received a procedurally fair hearing, Judge Grady concluded that § 411(a)(5), by implication, required that a union trial committee be composed entirely of union members. Since the JAC which tried and expelled the appellees was composed of an equal number of union and employer representatives Judge Grady held "that the Joint Apprenticeship Committee is not a body that satisfies the requirements of Title XXIX, Section 411(a)(5)." (Tr. 18, 9/1/78).

On appeal the union has challenged this ruling contending that the district court has improperly legislated the composition of a union trial body. While the district court does not have the affirmative authority to determine the composition of the trial committee, it does have the duty to determine whether the trial committee is improperly constituted. *Falcone* v. *Dantinne*, 420 F.2d 1157 (3d Cir. 1969); *Kiepura* v. *Local Union 1091, United Steelworkers of America*, 358 F. Supp. 987 (N.D.Ill. 1973). Judge Grady was, in fact, merely interpreting the termination procedures in light of § 411(a)(5). This is required by 29 U.S.C. § 411(b) which declares void any provision of a union constitution that violates the Act.

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3. 29 U.S.C. § 412 creates a civil right of action in district court for any infringement of rights created by the Act.

We find Judge Grady's reading of the requirements of Section 411(a)(5) to be a reasonable one and consistent with the LMRDA's goal of promoting democratic self-government within unions. The Senate committee report on the Act states three broad principles underlying the Act:

> 1. The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization. Trade unions have made a commendable effort to correct internal abuses; hence the committee believes that only essential standards should be imposed by legislation. Moreover, in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective-bargaining agents.
>
> 2. Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs. The committee strongly opposes any attempt to prescribe detailed procedures and standards for the conduct of union business. Such paternalistic regulation would weaken rather than strengthen the labor movement; it would cross over into the area of trade union licensing and destroy union independence.
>
> 3. Remedies for the abuses should be direct. Where the law prescribes standards, sanctions for their violation should also be direct. The committee rejects the notion of applying destructive sanctions to a union, i.e., to a group of working men and women, for an offense for which the officers are responsible and over which the members have, at best, only indirect control. Still more important the legislation should provide an administrative or judicial remedy appropriate for each specific problem.

S. Rep. 187, 86th Cong. 1st Sess., *reprinted in* 1959 U.S. Code Cong & Ad. News, 2318, 2323.

Union self-government would be impaired and the ability of unions to function in their roles as collective bargaining agents if employers intruded into such a sensitive area as union disciplinary matters. While the caselaw is not abundant on this point, Judge Grady's reading of § 411(a)(5) is a supportable one. The full and fair hearing contemplated by the statute requires at a minimum a hearing by an impartial tribunal, one that is unbiased and disinterested. *Curtis* v. *International Alliance of Theatrical Stage Employees, and Moving Picture Machine Operators of the United States & Canada, Local 125*, 687 F.2d 1024 (7th Cir. 1982); *Feltington* v. *Moving Picture Machine Operators' Union Local 306 of I.A.T.S.E.*, 636 F.2d 890 (2d Cir. 1980); *Semancik* v. *United Mine Workers of America*, 466 F.2d 144 (3d Cir. 1972); *Carroll* v. *Associated Musicians of Greater New York, Local 802*, 235 F. Supp. 161 (1963). Although this right is usually addressed in terms of disqualifying members of the trial committee shown to be biased, it also encompasses a right to a properly constituted trial committee. *Kiepura* v. *Local Union 1091, United Steelworkers of America*, 358 F.Supp. 987 (D.C. Ill. 1973).

In addition to scant judicial attention, this issue has rarely been considered in the secondary literature. Scholarly writing has always implicitly assumed that the *trial* body would be composed entirely of union members and, as a result, focused directly on issues of potential bias. *See, e.g.*, Brooks, *Impartial Public Review of Internal Union Disputes: Experiment in Democratic Self-Discipline*, 22 Ohio St. L. J. 64, 71-73 (1961); Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1082-84 (1951).

Against this background it appears that employers have no part to play in the internal disciplinary procedures by which a union expells one of its own members. If the procedural rights in § 411(a)(5) are analagous to constitutional standards of due process, *Falcone v. Dantinne*, 420 F.2d 1157 (3rd Cir. 1969), then the right to a trial committee composed exclusively of fellow union members is analagous to the right to be tried by a jury of one's peers. Representatives selected by employers in the industry lack the necessary community of interests with union members to function in this capacity.[4]

For example, Article XXIV of the International Union's Constitution lists thirteen offenses for which a member may be penalized. Many of these offenses consist of either violation of a provision of the Constitution and By-Laws or actions that are detrimental to the interests of the union's representation of its members in collective bargaining with the industry. To let the union's interests in such matters be adjudicated by representatives of industry would subvert the purpose of the LMRDA and the goals of a healthy labor union system. An illustration of the differing values of union and employers is found in the instant case where the appellees would not have been terminated but for the votes of the employer representatives.

III.

It is important to realize the narrowness of the rulings of both the district court and our affirmance. Judge Grady held unlawful only the expulsion of the appellees from

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4. In this regard it is important to note that Young and Moran could not have been removed but for the votes of the industry representatives. *See supra*, note 1.

union membership. The district court was careful to acknowledge that he was not ruling on the propriety of the appellee's termination from the apprentice program itself. Since the source of the appellees inability to work was their termination from the apprentice program,[5] and not their expulsion from the union, all damages were denied. Judge Grady merely reinstated their membership in the union because of the violation of Section 411(a)(5).

We have affirmed this narrow holding. Our affirmance does not invalidate any part of the apprentice program for the industry. Union-employer collaboration on certain aspects of the program is contemplated by 29 U.S.C. § 50 and the standards set forth at 29 C.F.R. § 29 (1981). Our holding does not interfere with the operation of the Area Agreement or its procedures for joint union-employer action in expelling a worker from the *apprentice program.*

Instead, our holding invalidates only the section of the Union Constitution which states that the Joint Trade Board's expulsion of an apprentice also automatically and conclusively terminates the apprentice's membership in the union. The union has argued that it is being penalized for making its apprentices members of the union and that this limited membership is derivative and of no value without participation in the apprentice program itself. This fact was acknowledged by the district court in denying damages for expulsion from the union. We agree with the district court in this matter that the appellees are entitled

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5. The Area Agreement covering the appellees prohibited the employment of any worker terminated from the apprenticeship program.

to no other relief than their reinstatement, for what it is worth, as members of the union. It is the status as a *Union member* that 29 U.S.C. § 411(a)(5) protects, and which cannot be revoked except by full compliance with the provisions of the Act.

IV.

Attorneys fees shall be awarded as indicated by the agreed order of the parties in the district court. For the foregoing reasons the decision of the district court is AFFIRMED.

No. 81-2375

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge

DENNIS M. YOUNG and MICHAEL MORAN, *Plaintiffs-Appellees,* vs. INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 17, *Petitioner Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 78 C 1897 JOHN F. GRADY, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by petitioner defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

DENNIS M. YOUNG, et al.,
Plaintiffs,

v.

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 17,
Defendant.

No. 78 C 1897

FINAL JUDGMENT ORDER

The court entered an order on September 1, 1978 finding that the plaintiffs Dennis M. Young and Michael Moran were unlawfully expelled from the defendant union in violation of 29 U.S.C. § 411, in that the procedures required by that statute were not followed. The court reserved the question of whether plaintiffs have sustained damages as a result of their unlawful expulsion from the union.

Thereafter the court heard evidence on the question of damages and has found that, while plaintiffs have been unable to obtain employment with union employers, the reason for their inability to obtain such employment is not the fact that they were expelled from the union but rather the fact that the collective bargaining agreement prohibits employers from employing persons who, like plaintiffs, have been expelled from the joint apprenticeship program. The court finds, therefore, that plaintiffs have

failed to prove they have sustained damages as a proximate result of their expulsion from the union and grant defendant's motion at the close of plaintiff's case that damages be denied.

Accordingly, it is hereby ordered and adjudged that:

(1) Plaintiffs shall be reinstated in the defendant union in the same membership status they enjoyed prior to their purported expulsion and shall have all rights and privileges appertaining to that membership status.

(2) Plaintiffs' prayer for money damages against the defendant is denied.

DATED: July 21, 1981

ENTER: JOHN F. GRADY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

DENNIS M. YOUNG, et al.,
Plaintiffs,

v.

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 17,
Defendant.

No. 78 C 1897

MEMORANDUM OPINION

Plaitiffs brought this action pursuant to the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 401 *et seq.* alleging illegal dismissal from their union. Plaintiffs have alleged that they were members of the union and were employed in the Asbestos Workers Apprentice Training Program from 1974 until March 1978 when they were expelled from both the union and the apprentice program. Their expulsion, plaintiffs allege, violated 29 U.S.C. § 411, as they were not given written notice of the charges against them, a reasonable time to prepare their defense, or a full and fair hearing. Defendant contends that since plaintiffs' allegations involve defendant's interference with plaintiffs' employment, jurisdiction is exclusively in the National Labor Relations Board ("NLRB"). Defendant has moved to dismiss.

Plaintiffs were expelled from the apprentice program for failure to work a required number of hours. That action of the Joint Apprenticeship Committee ("JAC"), comprised of an equal number of union and employer members, was upheld by the Joint Trade Board, another joint employer-union committee. Although they were never given written notice of charges, plaintiffs were given an opportunity to improve their performance, adequate time to prepare a defense, and fair hearings with the opportunity to present their defense. Pursuant to Article III, Section 7 of the Union's constitution, cancellation of the union membership automatically followed the cancellation of the apprenticeship. As we read the complaint, it is this union termination that plaintiffs contest.[1]

Plaintiffs allege they were members of the union,[2] and that they have been expelled from the union, by operation

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1. To the extent plaintiffs seek reinstatement into the apprenticeship program, we agree with defendant that we are unable to grant the relief requested. The JAC is the body responsible for the plaintiffs' termination, and would be the body responsible for their reinstatement. However, the JAC is not a labor organization, and is therefore not amenable to suit under the LMRDA. Since the JAC is not, and could not be before this court, we disregard plaintiffs' request for reinstatement into the apprenticeship program. Moreover, it appears to us that even if the JAC were subject to suit under the LMRDA, the procedure the JAC followed in terminating plaintiffs' apprenticeship would satisfy the requirements of § 411(a)(5).

2. Plaintiffs allege they were registered members of the union. The Union's constitution provides for apprentice membership (Article III, Sections 1, 6, 7, 9, 10.) Apprenticeship members pay only 50 per cent of the initiation fee, and reduced dues. They cannot vote in meetings, but are allowed to attend and speak. (Defendant's exhibits for the complaint, Exhibit C). We believe that such status, although less than full membership, is nonetheless union membership entitled to protection under the LMRDA.

of the constitutional provision, without the protections envisioned by § 411(a)(5). The allegations clearly state a cause of action under this section. Defendants argue, however, that since union's behavior is also possibly a violation of the National Labor Relations Act ("NLRA"), we have no jurisdiction. We recognize that the pre-emption doctrine has been shaped to prevent "... conflict between the exertion of judicial and administrative power in the attainment of the multifaceted policies underlying the federal scheme." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 286 (1971); *see also, Farmer* v. *Carpenters*, 430 U.S. 290 (1977). However, there are exceptions to the pre-emption doctrine. "In addition to the judicially developed exceptions referred to in the text, Congress itself has created exceptions to the Board's exclusive jurisdiction in other classes of cases." *Farmer, supra*, n. 8 at 290. We conclude that 29 U.S.C. § 412, permitting suit in a district court, is such a Congressionally created exception to the preemption doctrine.

The Court in *Boilermakers* v. *Hardeman*, 401 U.S. 233 (1971) addressed the very issue before us. In that case, plaintiff alleged that he had been denied a full and fair hearing in a union disciplinary proceeding in violation of 29 U.S.C. § 411(a)(5). The defendant moved to dismiss on pre-emption grounds. The Court held that the claim was not within the exclusive competence of the National Labor Relations Board. *Id.* at 238. The Court noted that the reasons for finding pre-emption were missing in that situation. Congress was of the opinion that the protections embodied in the LMRDA were new material in the body of federal labor law. Thus, issues raised were not within the special competence of the NLRB. Congress clearly

indicated a purpose to refer claims regarding a violation of § 411(a)(5) to the district courts. There was no attempt to have the district court enforce the provisions of the NLRA without guidance from the NLRB. The critical question was whether plaintiff was denied rights guaranteed him by the LMRDA. There was simply no danger of conflicting interpretations of the NLRA. See also, *Fulton Lodge No. 12 of Int. Ass'n of Mach & Aero Wkrs.* v. *Nix*, 415 F.2d 212 (5th Cir. 1969); *Plant* v. *Local Union 199, Laborers' Intern. Union of North America*, 324 F. Supp. 1021 (D. Del. 1971); *Keenan* v. *Metropolitan District Council of Philadelphia*, 266 F. Supp. 497 (E.D. Pa. 1966). The same analysis is applicable in our case. This action is within this court's jurisdiction.

Defendant's motion to dismiss is denied.

DATED: August 29, 1978.

ENTER:

United States District Judge

No. 82-2147

In the Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS LOCAL 17,

Petitioner,

v.

DENNIS M. YOUNG AND MICHAEL MORAN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October, 1983

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QUESTION PRESENTED FOR REVIEW

Whether the "full and fair hearing" requirement of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §411(a)(5)(C), is violated when one is expelled from membership in his union as a consequence of action taken by a committee or trial board, half of which is composed of *employers*.

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OPINIONS BELOW

The unpublished order of the United States Court of Appeals for the Seventh Circuit appears at pages 1 through 9 of the Appendix to the Petition. The unpublished order denying a motion for rehearing, with suggestion for rehearing *en banc*, appears at page 10 of the Appendix to the Petition. The unpublished final judgment order and memorandum opinion by the United States District Court for the Northern District of Illinois, Eastern Division, appears on pages 11-16 of the Appendix to the Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 15, 1983. A petition for rehearing, with suggestion for rehearing *en banc*, was denied on March 29, 1983. The mandate was stayed through June 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(i).

STATUTES INVOLVED

Section 101(a)(5)(C) and §101(b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §411(a)(5)(C) and (b) are the statutes involved. Section 101(a)(5)(C) of the Act provides: "**Safeguard Against Improper Disciplinary Action.** No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." Section 101(b) provides that: "Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect."

STATEMENT

For several years prior to 1978, the respondents were apprentices in a program administered by the Joint Apprenticeship Committee ("JAC"), which was comprised of an equal number of representatives from Local 17 of the International Association of Heat and Frost Insulators and Asbestos Workers and from various insulation

contractors. In 1978, this joint management-labor committee, by a vote of 6 to 2,[1] voted to terminate the respondents' participation in the apprenticeship program due to their failure to have worked the requisite number of hours under the rules of the apprenticeship program.[2]

This decision was affirmed by the Joint Trade Board, a body comprised equally of representatives from the union and the employer-contractors. As a consequence of their expulsion from the apprenticeship program, the respondents were expelled from the union pursuant to a provision in the union's by-laws which provided for automatic non-reviewable expulsion from the union upon termination from a joint apprenticeship program. (Pet. App. 14).

The respondents filed suit seeking reinstatement in the union. In essence, the complaint charged that the respondents did not receive the "full and fair hearing" mandated by the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §411(a)(5)(C), since their expulsion from the union ultimately was precipitated by action of a trial body comprised of employers.

In a carefully circumscribed decision, the district court held that under the Act expulsion from union membership was impermissible if it resulted from action of a tribunal comprised largely of employers. Accordingly, the court ordered the respondents to be reinstated *in the union* in the limited status they enjoyed before their automatic ex-

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[1] All four contractors voted to remove the respondents from the program. The union representatives split 2 to 2. (Pet. App. 3, n.1). The respondents were not presented with a written specification of charges. (Pet. App. 14).

[2] Respondent Young was one hour short of meeting the requirements.

pulsion and, pursuant to 29 U.S.C. §411(b), declared void the automatic expulsion provision of the union constitution. The court held it had no authority to order the respondents to be reinstated in the apprenticeship program, and it refused to make a monetary award of damages. (Pet. App. 11; 14).

In an unpublished order, the Seventh Circuit affirmed. The court held that LMRDA's goal of promoting democratic self government would be impaired if employers were allowed to have a role in the exceedingly sensitive and necessarily internal area of expulsion from union membership. The court found that, at a minimum, the "full and fair hearing" requirement imposed by LMRDA demanded a tribunal that was unbiased and disinterested. Lacking the necessary community of interest with union members, employers and their representatives cannot mete out discipline to union members. Since the respondents' expulsion ultimately traced its origins to action by a trial board composed largely of employers, the respondents were denied a "full and fair hearing" within the meaning of §411(a)(5)(C). (Pet. App. 1-9).

In this Court, as in the court below, the petitioner has advanced the startling argument that absent a showing of actual bias on the part of a member of a disciplinary tribunal, there cannot be a violation of LMRDA's requirement of a "full and fair hearing", *even though the tribunal is composed of employers.*[3] Despite the Petition's labored

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[3] We are confident that in no prior case has a union advanced the proposition that management has the right, however indirectly, to be involved in a union's internal disciplinary process.

efforts, a careful reading of the court's narrow holding[4] leads irresistably to the firm conclusion that it does not contravene the general legislative policy of limited judicial intervention in union self-government, that it is not in conflict with the decisions of other circuits, and that it does not present a question of general importance, but rather one limited to the singular facts of this case.

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[4] The Seventh Circuit took pains to stress the narrowness of the district court's decision and its own affirmance. Thus, the court pointed out that neither its decision nor that of the district court questioned the propriety of the respondents' expulsion *from the apprenticeship program* at the hands of an employer-union committee; neither opinion questioned any part of the apprenticeship program or the standards under which it was created or operated. Finally, neither decision interfered with the operation of the union's collective bargaining agreement or sought to interfere with union-employer collaboration in the operation of joint apprenticeship programs. (Pet. App. 7-8). Thus, the petitioner's suggestion that the fate of jointly administered apprenticeship programs may be at stake (Pet. at 18) is nothing more than an unsupportable *in terrorem* argument advanced to give an aura of importance to a very straightforward case.

REASONS FOR NOT GRANTING THE WRIT

A.

The years prior to 1959 had witnessed a sordid pattern of abuses and breaches of trust by unions against their rank and file members. In an attempt to eradicate these abuses, to foster union democracy, and to vouchsafe minimum standards of democratic process, Congress passed the Labor-Management Reporting and Disclosure Act of 1959. Title I of the Act guarantees to all union members certain substantive rights which Congress deemed essential to rank and file involvement in union affairs. No less important are the provisions of the Act which enunciate minimal standards of procedural due process for the protection of members subject to union discipline. *See Hall* v. *Cole*, 412 U.S. 1 (1973); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 194 (1967).

Thus, §101(a)(5)(C) of the Act, 29 U.S.C. §411(a)(5)(C), prohibits the disciplining of any member by a union unless he is afforded a "full and fair hearing." While the union member need not necessarily be provided with the complete panopoly of rigid procedural safeguards found in criminal proceedings, fundamental and traditional concepts of due process do apply.[5] Since, under the due pro-

[5] *See* Rosario v. Amalgamated Ladies Garment Cutters Local 10, 605 F.2d 1228, 1240 (2d Cir. 1979); Ritz v. O'Donnell, 566 F.2d 731, 735 (D.C. Cir. 1977); Tincher v. Piasecki, 520 F.2d 851, 854 (7th Cir. 1975) (and cases cited); Falcone v. Dantinne, 420 F.2d 1157, 1166 (3d Cir. 1969) (and cases cited). *Cf.*, International Brotherhood v. Hardeman, 401 U.S. 233, 246 (1971) ("Senator Kuchal, who first introduced [the full and fair hearing provision of LMRDA] characterized it, on the Senate Floor, as requiring the 'usual reasonable constitutional basis' for disciplinary action.").

cess clause, there cannot be a fair trial without an impartial and fair decision maker, *Withrow* v. *Larkin*, 421 U.S. 35, 46-47 (1975); *Estes* v. *Texas*, 381 U.S. 532, 543 (1965), it is not surprising that every federal court which has addressed the issue has held that the "full and fair hearing" requirement of §411(a)(5)(C) demands that the union tribunal be impartial and unbiased.

Sensitive to Congressional insistence that basic due process considerations apply to union disciplinary proceedings, the lower courts have been virtually unanimous in recognizing that, quite apart from any question of actual bias on the part of the decisionmaker, the composition of a hearing tribunal may be an integral determinant of the fairness, *vel non*, of a particular proceeding.[8] Thus, while

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[8] *See, e.g.*, Perry v. Mill Drivers Employees Union, 656 F.2d 536 (9th Cir. 1981) (trial panel dominated by persons whose political interests would be served by the imposition of penalties cannot be condoned); Felington v. Moving Picture Machine Operators, 605 F.2d 1251 (2d Cir. 1979) (same—no need to show actual bias); Rosario v. Amalgamated Ladies Garment Inc., 605 F.2d 1228, 1243 (2d Cir. 1979) (trial panel comprised of one or more persons who have previously heard identical charges and adjudged accused to be guilty cannot give full and fair hearing); Tincher v. Piasecki, 520 F.2d 851, 854 (7th Cir. 1975) (panel comprised of one of more who were present at earlier trial does not satisfy requirement of a full and fair hearing, nor does a panel on which sat a person who has been charged by an accused in a collateral proceeding); Falcone v. Dantinne, 420 F.2d 1157, 1161-62 (3rd Cir. 1969); Kiepura v. Local 1091, 358 F.Supp. 987, 991 (N.D. Ill. 1973) (trial panel may not have on it anyone who witnessed the events in question); Pawlak v. Greenwalt, 464 F.Supp. 1265, 1271 (M.D. Pa. 1979); Stein v. Mutual Clerks Guild, 384 F.Supp. 444, 447 (D. Mass. 1974), *aff'd*, 560 F.2d 486, 491 (2d Cir. 1977) (mere participation, without regard to what was said, in trial panel's deliberations by the person who preferred charges, violates §411(a)(5)(C).

courts do not "have the affirmative authority to determine the composition of [a] Trial Committee, [they] do have the duty to decide when it is improperly constituted." *Kiepura* v. *Local 1091*, 358 F.Supp. 987, 991 (N.D. Ill. 1973).[7] This theme found more elaborate expression in *Rosario* v. *Amalgamated Ladies Garment Cutters Local 10*, 605 F.2d 1228, 1240 (2d Cir. 1979):

> ". . . the national policy against judicial interference in the internal affairs of unions is 'subject to important exception in specific areas in which Congress has found that the interests of individual members need special protection against the danger of overreaching by entrenched union leadership.' [citations omitted]. The union member's bill of rights generally, *including its full and fair hearing requirement, is one such area. While federal courts surely do not exercise 'supervisory powers' over union tribunals they have the duty to insure that unions satisfy Congress' mandate of fairness in union disciplinary proceedings.* To paraphrase *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 471 . . . *the freedom allowed unions to run their disciplinary proceedings was reserved for those proceedings which conform to the 'due process' principles written into §101(a)(5).*" (Emphasis supplied). *Accord McDonald* v. *Oliver*, 525 F.2d 1217, 1232 (5th Cir. 1976).

To properly fulfill this duty, the federal courts cannot be limited—because due process is not limited—to cases involving actual bias. Rather, courts must also be able to act in those "various situations . . . in which experience teaches that the probability of bias on the part of the . . .

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[7] *Compare*, Steelworkers v. Sadlowski, 457 U.S. 102, 111, n.4 (1982) ("courts are to play a role in the determination of reasonableness" under §101(a)(2) of LMRDA).

decisionmaker is too high to be constitutionally tolerable." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975).*

The decision below is faithful to these principles and to the vivifying spirit of the Act itself. The court of appeals did not arrogate unto itself the right to prescribe how union disciplinary tribunals should be composed. On the contrary, it explicitly disavowed the notion that the Act invests federal courts with any such general supervisory power. (Pet. App. 4). The court merely held that LMRDA does not authorize *employers* to play a role in a union's internal disciplinary process. (Pet. App. 6-7). This decision is indisputably correct.

Exclusion of management from involvement in matters connected with internal union discipline is at once consistent with and mandated by the history of labor legislation in this Nation and the particular policies on which LMRDA itself is bottomed. Indeed, acceptance of the union's position to the contrary would signal a radical break with and subvert the goals subserved by LMRDA.

The "primary" and "overriding objective" of LMRDA was to insure "that unions would be democratically governed and responsible to the will of their memberships." *Finnegan* v. *Leu*, 456 U.S. 431, 436, 441 (1982). *See also Hall* v. *Cole*, 412 U.S. 1, 7-8 (1973) (rights in Title I of LMRDA are "deemed 'vital to the independence of the membership and the effective and fair operation of the union as the representative of its membership.' "); Pet. App. 5.

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* In the context of LMRDA, *Withrow* has served as the predicate for the holding that "it is inherently improper for a person who has been charged by an accused in a collateral proceeding to participate as a committee member in the accused's disciplinary hearing." Tincher v. Piasecki, 520 F.2d 851, 855 (7th Cir. 1975). A joint employer-labor disciplinary tribunal likewise presents an intolerably high risk of inherent bias. *See* discussion, *infra* at 10.

To that end, LMRDA explicitly prohibits employer involvement in internal union affairs. For example, Title IV of the Act prohibits the use of employer funds in election campaigns. "This ban reflects a desire to minimize the danger that employers will influence the outcome of union elections." *Steelworkers* v. *Sadlowski*, 457 U.S. 102, 117 (1982). Similarly, Title I prohibits employers directly or indirectly from financing, encouraging, or participating in suits by union members against their unions. 29 U.S.C. §411(a)(4). So pivotal and imperious is LMRDA's goal of union democracy that this Court has sustained rules barring union members from accepting campaign contributions from non-members even though those rules might well affect vigorous debate and favor entrenched union leaders. *See Steelworkers* v. *Sadlowski*, *supra*, 457 U.S. at 112, 115-116.

The conclusion that employer involvement in a union's internal disciplinary process would be alien to LMRDA's goals is further buttressed by the fact that the relationship between labor and management is essentially adversarial.[9] It is not necessary to track the odyssey of development of labor legislation in this Country to realize that the labor-management relationship is not one between equals having a commonality of purpose, but rather is one of economic inequality and dependence among groups lacking shared

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[9] The adversarial nature of this relationship is not attenuated by the existence of apprenticeship programs, jointly administered by a labor-management committee. Obviously, there are areas of common ground such as insuring that workers are properly trained, resolving questions of job seniority in the event of a company's sale or merger, Humphrey v. Moore, 375 U.S. 335 (1964) (Pet. at 18, n.15), and other matters equally affecting both groups. This limited commonality of interest cannot, however, obscure the fact that the labor-management relationship is essentially a conflictual one.

and enduring goals. *See NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969); *Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960); *NLRB* v. *Virginia Power Co.*, 314 U.S. 469, 477 (1941).

It is this essentially antagonistic role which makes unthinkable management involvement in matters affecting internal union discipline, for management's role as labor's adversary precludes it from having the requisite degree of impartiality and fairness which §411(a)(5)(C) demands. Phrased differently, management involvement in union disciplinary matters would present one of those "various situations . . . in which experience teaches that the probability of bias on the part of the . . . decision maker is too high to be constitutionally tolerable." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975).

In addition to subverting the goals of union democracy and union autonomy, employer involvement in union discipline would undermine fair and unbiased *union* participation in the disciplinary process. This Court has long recognized that as a consequence of the economic dependency of employees on their employers, the latter can exert a subtle influence on various decisions which the employee may be called upon to make. *See, e.g., NLRB* v. *Gissel Packing Co., supra*, 395 U.S. at 617-18; *Shelton* v. *Tucker, supra*, 364 U.S. at 486; *NLRB* v. *Virginia Power Co., supra*, 314 U.S. at 477. Indeed, "the necessary tendency of [employees], because of that [economically dependent] relationship, [is] to pick up intended implications of the [employer] that might be more readily dismissed by a more disinterested ear." *NLRB* v. *Gissel Packing Co., supra*, 395 U.S. at 617-18.

One need not be a master of psychology to appreciate the subtly coercive impact which an employer-member of a disciplinary committee could exert on his union counter-

parts. Under such circumstances, fair, voluntary, and unbiased employee participation in the disciplinary process would be a practical impossibility. It is thus fanciful to suggest that a joint employer-union disciplinary committee can have the necessary degree of detachment required of decisionmakers by those fundamental due process considerations which Congress has woven into the very fabric of LMRDA.

In sum, the plain language of LMRDA,[10] its legislative history, and the decisions of this and the inferior federal courts make clear that expulsion from union membership cannot pass muster under LMRDA where the disciplinary tribunal is composed of employers.

B.

None of the three cases cited by the Petition are comparable, let alone contrary, to the decision below, for not one involved discipline of a union member by a panel on which sat one or more *employers*.

Among the issues presented in *Ritz* v. *O'Donnell*, 566 F. 2d 731 (D.C. Cir. 1977) (Pet. at 14), was whether Ritz, an airline pilot and member of the union, the Airline Pilots Association, was denied a "full and fair hearing" by virtue of the fact that two of the members of the disciplinary panel, who were themselves union members, were employed by United and Braniff Airlines, which were the

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[10] By its plain terms, §411(a)(5)(C) precludes employer participation in the disciplinary process: "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues *by such organization or by any officer thereof* unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." (Emphasis supplied).

employers of the two captains who instituted the charges against Ritz. In a 2 to 1 decision, the panel rejected the argument that the Act was violated merely because the two members did not recuse themselves as required by the union's own rule requiring disqualification in any case involving pilots of their own airline. The panel held that the charging parties were not employed by the airlines at the time the matter was heard and that any involvement was nominal. 566 F.2d at 737.

Ritz obviously differs from this case, *toto coelo*, for unlike the situation which obtains here, *all of the members of the panel which disciplined Captain Ritz were themselves union members*! Precisely the same circumstances obtained in *Martire* v. *Laborers' Local 1058*, 410 F.2d 32 (3d Cir.), *cert. denied*, 396 U.S. 903 (1969). (Pet. at 16). There, the plaintiff was a member of Laborers Local 158 and "*an elected delegate to the Laborers District Council of Western Pennsylvania, with which the union was affiliated.*" 410 F.2d at 33 (Emphasis supplied). Pursuant to the District Council's constitution, three delegates to the Council filed charges against the plaintiff. Thereafter, he was tried by the District Council Trial Board which found him guilty. The action of the trial board was ratified by the District Council and, "after a hearing, by the general Executive Board of the International Union" as well. *Id.* at 34. The plaintiff filed suit against the union, claiming that the full and fair hearing requirement of LMRDA afforded him the right to be tried by his own Local.

Nothing in the court of appeals' rejection of this argument remotely suggests that trial by *management* is permissible under the Act. The court merely held, that "the fact that a local union member is disciplined by a *parent body within the union* does not constitute *per se* a denial of a fair hearing." The court posited that the situation would be different if the conflict involved an issue with

respect to which there was "a conflict of interest" between the local and the parent body. *Id.* at 37 (Emphasis supplied).[11] Thus, in *Martire*, as in *O'Donnell*, the trial board was comprised entirely of union members.

We come then to the last in the trilogy of cases relied on in the Petition, *Park* v. *Int. Brotherhood of Electrical Workers*, 314 F.2d 886 (4th Cir. 1963), *cert. denied*, 372 U.S. 976 (1964). (Pet. at 15). There a renegade local, which had engaged in an unauthorized strike, was expelled from the international union following a trial before the president of the international and appellate review by the International Executive Council. In rejecting the claim that the trial by the international president was not "full and fair", the court of appeals summarily held that it was permissible for the president to have at once acted as prosecutor and judge in the case. *Id.* at 913. The court held that while a dichotomy of functions might be desirable, federal courts "are justified in ruling a *union* tribunal biased only upon a demonstration . . . of specific prejudice." *Id.* (Emphasis supplied).

Quite apart from the questionable nature of the court's cramped construction of §411(a)(5)(C), the decision has no relevance to this case since the discipline dispensed there, in the words of the *Park* opinion, came from a "*union* tribunal". That is, in *Park*, as in *Ritz* and *Martire*, the hearing was conducted before a body comprised entirely of union members, not as here, a hybrid management/labor body.[12]

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[11] The relationship between management and labor is, by its very nature, adversarial. It is the existence of this inherent conflict of interest which precludes management from having a role in internal union discipline.

[12] Additionally, in all three cases there was internal *union* review of the disciplinary decisions. Here, the expulsion was not only automatic, but non-reviewable as well. (Pet. App. 3, n.2).

C.

At the close of the Petition, there is the anguished claim that corrective action by this Court is necessary lest the decision below result in the invalidation of provisions in the constitutions of several unions providing for "*Public Boards* to consider and rule upon disciplinary action taken against union members." (Pet. at 17) (Emphasis supplied). With all deference, only literary perversity or jaundiced partisanship can sponsor this contention.

As we have demonstrated, the decision below held only that §411(a)(5)(C) does not condone *management* involvement in a union's internal disciplinary process—nothing more. Neither the court of appeals nor the district court was presented with, nor did they purport to decide, the radically different question of whether " '*independent public review boards*' ", (Pet. at 16, n.13) (emphasis supplied), some of which employ "*outside legally trained hearing officers*",[13] could provide a "full and fair hearing" within the meaning of LMRDA.[14] Hence, the decision below cannot be dispositive of or even relevant to that question should it ever be presented for adjudication. For it is fundamental that prior precedent cannot be controlling unless there has been a deliberative consideration in the earlier case of the question raised in the later one.[15]

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[13] Brooks, *Impartial Public Review of Internal Union Disputes: Experiment in Democratic Self-Discipline*, 22 Ohio State L.J. 64, 84 (1961) (Emphasis supplied).

[14] While rejecting the claim that *management* can sit on a union trial board, the district court acknowledged that the Act might not be offended if an independent unbiased person, such as an arbitrator, were involved in the disciplinary process. (Pet. at 9, n.8).

[15] *See* City of Kenosha v. Bruno, 412 U.S. 507, 512-13 (1973). *Cf.*, Webster v. Fall, 266 U.S. 507 (1925); United States v. More, 3 Cranch 307 (1810); King Mfg. Co. v. Augusta, 277 U.S. 100, 135, n.21 (1928) (Brandeis, J., dissenting). *Compare* Buckley v. Valeo, 424 U.S. 1, 24 (1976) *with* BreadPAC v. FEC, 455 U.S. 577, 581 (1982).

CONCLUSION

Rule 17 of the Rules of this Court provides that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." Among the reasons which will justify granting of the writ is the issuance of a decision by a federal court of appeals which is in conflict with decisions of other circuits on the same subject or which "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Neither of these criteria for review has been met in the instant case.

Wherefore, we respectfully request that the Petition For A Writ of Certiorari be denied.

Respectfully submitted,

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